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Environment

Posted on Tue, Jun. 20, 2006

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Wetlands protections preserved

Supreme Court conservatives fail to limit Clean Water Act

BY JENNIFER A. DLOUHY
Hearst Newspapers

WASHINGTON — The Supreme Court ruled Monday that the government can block development on hundreds of millions of acres of wetlands, even on land miles away from waterways, as long as regulators prove a connection to the waterways.

Chief Justice John Roberts, in his first major environmental case, came up one vote short of dramatically limiting the scope of the landmark Clean Water Act.

At the same time, property rights advocates won a small victory with a new test, authored by moderate Justice Anthony Kennedy, for determining what land can be regulated.

Virtually any land in America would be covered under the government's interpretation of the law, Roberts and the court's other three conservatives complained in an opinion.

The court's four liberal members said the conservatives would have opened up sensitive wetlands to polluters.

It was a dramatic conclusion to a pair of property rights cases the justices agreed to review last fall, just days after Roberts joined the court. The Bush administration defended the law and had urged the court to stay out of the case.

The justices were so splintered that there were five separate opinions covering 100 pages.

The key decision was by Kennedy, who agreed with the liberal members that federal regulations can apply to land adjacent to tributaries, including tributaries that are not filled with water all year.

At issue before the court was whether wetlands adjacent to tributaries of "navigable waters" qualified for protection under the Clean Water Act. Specifically, the court was



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considering whether the U.S. Army Corps of Engineers had too broadly interpreted the law when it restricted real estate developers in Midland and Macomb County, Mich., from developing land because of the risk that pollutants could travel to protected water miles away.

"In applying the definition to ephemeral streams, wet meadows, storm sewers ... drain tiles, man-made drainage ditches and dry arroyos in the middle of the desert, the Corps has stretched the term 'waters of the United States' beyond parody," wrote Justice Antonin Scalia, who led the conservative bloc, including Roberts, Justice Clarence Thomas and new Justice Samuel Alito.

The court ruled 5-4 that the federal government may have overstepped its authority by barring the two Michigan landowners from developing their property.

Kennedy joined conservatives in that ruling, which sends the cases back to the U.S. Court of Appeals for the 6th Circuit for further review.

Environmental groups were relieved the ruling was not sweeping.

"Five justices of the Supreme Court wrote or joined opinions that support broad protection for rivers, streams and wetlands under the Clean Water Act," said Doug Kendall, executive director of the Community Rights Counsel.

Jim Murphy, a lawyer with the National Wildlife Federation, said, "Justice Kennedy saves it from being an absolute disaster."

Justices seemed worried about the impact of the ruling.

Roberts said the result was confusing and that "lower courts and regulated entities will now have to feel their way on a case-by-case basis."

Justice John Paul Stevens, the leader of the court's liberals, said Congress or the Army Corps of Engineers — and not appointed judges — should clarify the issue.

He predicted developers will be confused about whether they must get permits to do work, and federal regulators will struggle to apply a test spelled out by Kennedy to determine whether land has a connection to a navigable waterway.

This report includes information from the Associated Press.



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